

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

JOSEPH GERHART, ET AL.

PLAINTIFFS

VS.

CIVIL ACTION NO.: 3:11-cv-00586-HTW-LRA

JOHNNY BARNES ET AL.

DEFENDANTS

**MEMORANDUM IN SUPPORT OF MUNICIPAL DEFENDANTS' MOTION TO
DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT**

The fourth amended complaint that was filed in this case on December 1, 2016 was filed prior to this Court's March 31, 2017 summary judgment rulings and prior to the Fifth Circuit's October 25, 2017 and April 26, 2018 qualified-immunity decisions.¹ This Court recently struck that fourth amended complaint because it was not in compliance with the reason this Court provided for allowing it – namely, for the sole purpose of “modifying the capacity, age, and birthdate” of Brett Gerhart.² A new fourth amended complaint has now been filed, but it includes parties and claims that previously were dismissed as a result of this Court's summary judgment rulings and the Fifth Circuit's qualified immunity decisions.³

Out of an abundance of caution, Municipal Defendants file this dispositive motion to clarify the remaining claims in this case. The result of this Court's summary judgment orders was that the following claims remained against the individual defendants: (1) “Fifth Amendment violations under 42 U.S.C. § 1983 for unlawful entry” against McAlpin, (2) Excessive Force violations under 42 U.S.C. § 1983” against McAlpin, (3) Reckless Infliction of Emotional Distress” against McAlpin, (4) “Fifth Amendment violations under 42 U.S.C. § 1983 for unlawful entry” against Barnes, (5) “Reckless Infliction of Emotional Distress” against Barnes,

¹ Compare Doc. No. 206 with *Gerhart v. Barnes*, 724 Fed. App'x 316 (5th Cir. 2018), *Gerhart v. McLendon*, 714 Fed. App'x 327 (5th Cir. 2017), and Doc. Nos. 234 & 235.

² See Doc. No. 258.

³ See Doc. No. 260.

and (6) and unlawful entry claim against McClendon.⁴ Interlocutory appeals were taken from this Court's summary judgment orders, and the Fifth Circuit held that the following claims remain against the individual defendants: (1) a Fourth Amendment unlawful entry claim against McAlpin, McLendon, and Barnes and (2) a Fourth Amendment excessive force claim against McAlpin.⁵ In light of this Court's and the Fifth Circuit's rulings, most of the parties and claims included in the recently-filed fourth amended complaint must be dismissed.

ARGUMENT & AUTHORITIES

The Gerharts' fourth amended complaint includes numerous defendants and claims. With respect to defendants, it names Rankin County, Mississippi, Sheriff Ronnie Pennington, the City of Pearl, Mississippi,⁶ former Police Chief Ben Schuler,⁷ Officer Jamie Scouten,⁸ Deputy Brett McAlpin, Officer Johnny Barnes, Agent Brad McLendon, and Agent Leigh Cochran.⁹ With respect to claims, it includes a variety of federal and state causes of action.¹⁰ These parties and claims were previously addressed during this Court's summary-judgment proceedings and during the Fifth Circuit's interlocutory-appeal proceedings.¹¹ This Court's allowance of a fourth amended complaint was solely for the purpose of permitting Brett Gerhart to be named as an adult rather than as a minor.¹²

In light of the prior rulings, this Court should clarify that a Fourth Amendment unlawful entry claim against McAlpin, McLendon, and Barnes and a Fourth Amendment excessive force

⁴ See Doc. Nos. 234 & 235.

⁵ See *Barnes*, 724 Fed. App'x at 328; *McLendon*, 714 Fed. App'x at 336.

⁶ The City previously was dismissed and has not been served with the fourth amended complaint. Therefore, it must be dismissed for lack of service of process as well.

⁷ Schuler previously was dismissed and has not been served with the fourth amended complaint. Therefore, he must be dismissed for lack of service of process as well.

⁸ Scouten previously was dismissed and has not been served with the fourth amended complaint. Therefore, he must be dismissed for lack of service of process as well.

⁹ See Doc. No. 260 at ¶¶4-12.

¹⁰ *Id.* at ¶¶45-67.

¹¹ *Barnes*, 724 Fed. App'x at 328; *McLendon*, 714 Fed. App'x 336; Doc. Nos. 234 & 235.

¹² See Doc. No. 258.

claim against McAlpin are the only remaining claims in this case. The Gerharts have never sought to modify this Court's summary judgment rulings or the Fifth Circuit's mandate. It would be impermissible for the Gerharts to attempt to re-litigate parties and claims that previously have been dismissed. *See, e.g., Deutsche Bank Nat'l Trust Co. v. Burke*, 2018 WL 4223562, *2-3 (5th Cir. Sept. 5, 2018) (discussing the mandate rule, the law of the case doctrine, and other issue/claim preclusion principles).

CONCLUSION

For these reasons, it is requested that this Court dismiss all parties and claims included within the fourth amended complaint, with the exception of a Fourth Amendment unlawful entry claim against McAlpin, McLendon, and Barnes and a Fourth Amendment excessive force claim against McAlpin.

Dated: September 14, 2018.

Respectfully submitted,

PHELPS DUNBAR, LLP

BY: /s/ G. Todd Butler

Gary E. Friedman, MB #5532
G. Todd Butler, MB #102907
4270 I-55 North
Jackson, Mississippi 39211-6391
Post Office Box 16114
Jackson, Mississippi 39236-6114
Telephone: 601-352-2300
Telecopier: 601-360-9777
Email: friedmag@phelps.com
butlert@phelps.com

CERTIFICATE OF SERVICE

This will certify that undersigned counsel has filed the foregoing with the Clerk of the Court, utilizing the Electronic Case Filing system, which sent notification of such filing to the following counsel of record:

Charles R. McRae, Esquire
Annette B. Mathis, Esquire
Gale N. Walker, Esquire
CHUCK MCRAE LAW OFFICE
416 East Amite Street
Jackson Mississippi 39201
(601) 944-1008
chuck@mcrailaw.net
Annette@mcrailaw.net
gale@mcrailaw.net

ATTORNEYS FOR PLAINTIFFS

J. Lawson Hester, Esquire
Jason Edward Dare, Esquire
4450 Old Canton Rd., Suite 210
Jackson MS 39211
jdare@pbhfirm.com
lhester@pbhfirm.com

***ATTORNEYS FOR DEFENDANTS RANKIN COUNTY MISSISSIPPI,
SHERIFF RONNIE PENNINGTON AND DEPUTY BRETT MCALPIN***

Justin L. Matheny, Esq.
Wilson D. Minor, Esq.
MISSISSIPPI ATTORNEY GENERAL'S OFFICE
P.O. Box 220
550 High Street (39201)
Jackson MS 39205-0220
(601) 359-6279
wmino@ago.state.ms.us

ATTORNEYS FOR DEFENDANT BRAD MCLENDON

DATED, this the 14th day of September, 2018.

/s/ G. Todd Butler

G. TODD BUTLER